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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1951.

No. _____

ROY L. MORGAN, *Petitioner,*

vs.

GRIFFITH REALTY COMPANY, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States—

Your Petitioner respectfully shows:

I.

Summary Statement of Matter Involved.

1. On December 6, 1946, respondent executed and delivered to petitioner the following letter (R. 53-54):

"December 6, 1946.

Re: Block 10, Morgan Heights Re subdivision, Blocks 9, 10, 11, 12 and 13 in Morgan Heights First Addition to City of Tulsa, according to the recorded plat thereof.

Mr. Roy L. Morgan,
Tulsa, Oklahoma.

The above property was purchased from you by Griffith Realty Company. It is our intention to build a

theatre on this property. If at any time in the future we should abandon this intention, you will be given the opportunity to repurchase this property at our cost of $20,000.

Yours very truly,
Griffith Realty Company,
By: /s/ Henry S. Griffing,
Vice President."

2. The letter was delivered by respondent to petitioner simultaneously with the delivery of a warranty deed by Morgan, his wife, and Morgan's corporation, Tulsa Defense Houses, Inc., as grantors, to the respondent. (R. 57-58) The deed and letter have been treated by both petitioner and respondent as comprising one instrument, the same as if the language of the letter had been inserted in the deed. (R. 34, 66)

3. On August 3, 1950, respondent commenced this action against petitioner in the United States District Court for the Northern District of Oklahoma, seeking declaratory judgment decreeing its own letter to be invalid as an illegal restraint upon the power of alienation. (R. 1-3)

4. The trial court held that the interest received by petitioner Morgan, under the terms of the option letter, was that embraced in the provisions of Title 16, Oklahoma Statutes, Section 29, which provides (R. 7-8):

> "Every estate in land which shall be granted, conveyed or demised by deed or will shall be deemed an estate in fee simple and of inheritance, unless limited by express words."

5. The trial court further held, as a matter of law, that the interest created by the option letter, being an estate of inheritance, had a possible future existence of longer than

lives in being and twenty-one (21) years, thereby causing the letter to be invalid as an illegal restraint upon the power of alienation, citing Title 60, Oklahoma Statutes, Section 175.47, which provides (R. 8):

> "The absolute power of alienation of real and personal property, or either of them, shall not be suspended by any limitations or conditions whatever for a longer period than during the continuance of a life or lives of the beneficiaries in being at the creation of the estate and twenty-one years thereafter. * * *"

6. On April 7, 1951, the trial court's judgment was appealed to the United States Court of Appeals for the Tenth Circuit, wherein there was presented the question of the applicability of the two quoted statutes. (R. 10)

7. The decision of the Court of Appeals did not follow the holding of the trial court applying Title 16, Oklahoma Statutes, Section 29, to the interest received by the optionee, Morgan, under the letter, but held that while an option contract in Oklahoma conveys no title to real estate, it creates rights *in personam*, which are an encumbrance upon the title of the property to the extent that the absolute power of alienation is suspended by limitation or condition, thereby contravening the common law rule against perpetuities and the Oklahoma statutory prohibition of restraints on alienation. (R. 67-68) The decision expressly recognized a contrariety of opinion among the courts on the question of whether such an option violates the common law perpetuity rule, but did not discuss any basis for the divergence of such authority. (R. 67)

8. The Court of Appeals further held that under Oklahoma law, an option contract, unlimited as to time, must expressly exclude the words, "heirs and assigns," and must

expressly provide that the option rights shall be personal to the optionee, otherwise such rights, as a matter of law, extend to the heirs and personal representatives of the optionee. (R. 68-69)

9. Your petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Court of Appeals for the Tenth Circuit.

II.

Jurisdictional Statement.

The judgment of the Court of Appeals was entered November 15, 1951 (R. 69), and Order Denying Petition for Rehearing was entered December 12, 1951. (R. 85) The jurisdiction of this Honorable Court is invoked under United States Supreme Court Rule 38 5(b) of Title 28 of the United States Code.

III.

Questions Presented.

1. The court erred in applying the common law perpetuity "rule of property," and in refusing to apply the Oklahoma statutory "rule of contracts" in determining the validity of the option contract, when, concededly, under local law, only "rights *in personam*" were involved.

2. The court erred in applying the common law rule against perpetuities and the Oklahoma statute prohibiting the suspension of the absolute power of alienation to the option contract, when, concededly, under local law, such option conveys no title or interest in the real property.

3. The court erred in holding the option contract must expressly exclude the optionee's heirs and assigns, and ex-

pressly provide that the option rights are personal to the optionee, in order to save the contract from the perpetuity rule and Oklahoma statute prohibiting restraints on alienation.

4. The respondent, having accepted the benefits of the warranty deed, having entered into possession, and, the position of the parties now being changed, is estopped from denying the validity of any portion of the deed.

IV.

Reasons Relied Upon for Allowance of Writ.

1. The Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local statutes and decisions.

2. The decision is in conflict with the holding enunciated in *Landon* v. *Morehead*, 24 Okl. 701, 126 Pac. 1027; *Anthis* v. *Sandlin*, 149 Okl. 126, 299 Pac. 458; *Bowen* v. *Vance*, 203 Okl. 136, 318 P. (2d) 628. The decision is also in conflict with the ruling *Campbell* v *Campbell*, 313 Ky. 249, 230 S. W. (2d) 918, the latest authority on this subject, a local decision factually parallel with the instant case, adjudicating an optionee's rights under a Kentucky state statute virtually identical with Title 60, Oklahoma Statutes, Section 175.47.

3. Heretofore, under well settled law in all jurisdictions, the basis for diversity of opinion among the courts on the validity of option contracts, unlimited as to time, has been the determination, under local law, of what kind of right or interest is created by the option agreement. The decision of the Court of Appeals now becomes the first such decision which, although expressly recognizing that under local law, the option contract conveyed no title or interest

in the real property, yet declares the option void, as violating the common law rule against perpetuities and the local statute prohibiting restraints on alienation. An early clarification is therefore expedient.

4. The decision is in conflict with Title 16, Oklahoma Statutes, Section 11, which provides:

> "Any person or corporation, having knowingly received and accepted the benefits or any part thereof, of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud.",

and the holding in *Downing* v. *Young Men's Christian Association of the University of Oklahoma,* 178 Okl. 292, 61 P. (2d) 859; *Allred* v. *Royalty Owners Assn.,* 202 Okl. 561, 216 P. (2d) 281; *Skelly Oil Co.* v. *Butner,* 201 Okl. 372, 205 P. (2d) 1153; *Kaylor* v. *Kaylor,* 172 Okl. 535, 45 P. (2d) 743; *U. S. Bond & Mortgage Co.* v. *Keahey,* 53 Okl. 176, 155 Pac. 557, L. R. A. 1917C 829; *Williamson* v. *Davis,* 74 Okl. 174, 177 Pac. 56; *Carlisle* v. *National Oil & Development Co.,* 108 Okl. 18, 234 Pac. 629; *Nickel* v. *Janda,* 115 Okl. 207, 242 Pac. 264; *Gibson* v. *Lyon,* 115 U. S. 439, 6 Sup. Ct. 129; *Keller* v. *Ashford,* 133 U. S. 610, 10 Sup. Ct. 494; *Cowell* v. *Colorado Springs Company,* 100 U. S. 55.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket, No. 4283, Roy L. Morgan, Appellant, *vs.* Griffith Realty Company, Appellee, to the end that

this cause may be reviewed and determined by this Court, as provided by the Statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem just and proper.

Dated this first day of March, 1952.

.....,

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Washington 6, D. C.,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

Opinion of Court Below.

The opinion in the United States Court of Appeals for the Tenth Circuit is reported in 192 F. (2d) 597.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is November 15, 1951, (R. 69) and order denying petition for rehearing was entered December 12, 1951. (R. 85)

2. The statutory provision which is believed to sustain the jurisdiction of this Court is United States Supreme Court Rule 38 5(b) of Title 28 of the United States Code.

3. The Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local statutes and decisions.

4. The statute and decisions believed to sustain said jurisdiction are as follows:

Landon v. *Morehead,* 24 Okl. 701, 126 Pac. 1027;

Anthis v. *Sandlin,* 149 Okl. 126, 299 Pac. 458;

Bowen v. *Vance,* 203 Okl. 136, 218 P. (2d) 628;

Campbell v. *Campbell,* 313 Ky. 249, 230 S. W. (2d) 918;

Title 16, Okla. Statutes, Sec. 11;

Allred v. *Royalty Owners Assn.,* 202 Okl. 561, 216 P. (2d) 281;

Skelly Oil Co. v. *Butner,* 201 Okl. 372, 205 P. (2d) 1153;

Kaylor v. *Kaylor,* 172 Okl. 535, 45 P. (2d) 743;

U. S. Bond & Mortgage Co. v. *Keahey,* 53 Okl. 176, 155 Pac. 557, L. R. A. 1917C, 829;

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Nickel v. *Janda,* 115 Okl. 207, 242 Pac. 264;

Downing v. *Young Men's Christian Assn. of the University of Okla.,* 178 Okl. 292, 61 P. (2d) 859;

Gibson v. *Lyon,* 115 U. S. 439, 6 Sup. Ct. 129;

Keller v. *Ashford,* 133 U. S. 610, 10 Sup. Ct. 494;

Cowell v. *Colorado Springs Company,* 100 U. S. 55.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1-4), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The court erred in applying the common law rule against perpetuities, which is a "rule of property" and the court erred in refusing to apply the Oklahoma statutory "rule of construction" of contracts in determining the validity of the option letter, since the letter created only rights *in personam.*

2. The Court of Appeals erred in holding that an option contract, which conveys no right, title or interest in real property violates the rule against perpetuities and the Oklahoma statute prohibiting the suspension of the absolute power of alienation, Title 60, Oklahoma Statutes, Sec. 175.47.

3. The Court of Appeals erred in holding that an op-

tion contract in Oklahoma must expressly exclude the optionee's heirs and assigns, and expressly provide that the option contract is personal to the optionee in order to save such contract from the common law rule against perpetuities and the Oklahoma Statute on suspension of the power of alienation.

4. The respondent, having accepted the benefits of the Warranty Deed, having entered into possession and the position of the parties now being changed, is estopped from denying the validity of any portion of the deed.

V.

ARGUMENT.

POINT A.

The common law perpetuity rule and the Oklahoma Statute on the suspension of power of alienation are not applicable in determining the validity of an option contract unlimited as to time for the repurchase of real property, when, under local law, such option conveys no title or interest in real property.

In rendering its decision, the Court of Appeals refused to apply the Oklahoma statutory "rule of construction" of contracts and struck down the written option on the theory that:

> "The interdiction of perpetuities is not a rule of construction. It is a peremptory command of law founded upon a sound principle of public policy and is to be rigidly enforced." (Citing *McLaughlin, et al.*, v. *Yingling, et al.*, 90 Okl. 159, 213 Pac. 552.) (R. 67)

The confusion which now exists, as a result of the holding, lies in the fact that a tribunal has rendered a decision expressly recognizing that under local law, an option conveys no right, title or interest in the real property, yet declaring

the option void by reason of the violation of the common law rule against perpetuities and the statutory prohibition of suspension of power of alienation.

Each decision heretofore on this question has always been determined by local interpretation of the optionee's right, interest, title and estate in real property. An extensive annotation on this subject appears in 162 A. L. R. 581, citing numerous authorities covering this subject. At page 584, it is said:

> "B. *Reasons* and *Arguments*. In approaching the question whether an option to purchase is affected by the rule against perpetuities, one is confronted at the outset by the problem of what kind of right or interest is created by the option agreement. *It is well settled that the rule against perpetuities concerns rights of property only, and does not affect contracts which do not create any interest or estate in property.* Moreover, it is also settled that the rule applies only to future contingent estates, and does not apply to vested estates. So, *In order to invalidate an option on this ground, it must be held* (1) *that it creates some interest or estate in property,* and also (2) that such interest or estate is contingent and not presently vested. (Italics ours.)
>
> "The authorities taking the view that an option to purchase is affected by the rule against perpetuities proceed on the reasoning that such an option creates an interest or estate in the property; and that the interest created by the option is not vested, but is contingent, and therefore within the rule against perpetuities.
>
> "On the other hand, the courts which hold that such options do not violate the rule against perpetuities take the view that an option does not give rise to an interest or estate in property, or that whatever interest is created thereby is a vested and not a contingent one."

The Court of Appeals' decision specifically recognized that the Supreme Court of Oklahoma has held, on more than one occasion, that an option is a contract, which conveys no title in the real estate, but creates rights *in personam*, citing *Landon* v. *Morehead*, 24 Okl. 701, 126 Pac. 1027; *Anthis* v. *Sandlin*, 149 Okl. 126, 299 Pac. 458; *Bowen* v. *Vance*, 203 Okl. 136, 218 P. (2d) 628. (R. 68) The Court of Appeals thereby conceded that the trial court was in error in applying Title 16, Okla. Statutes, Sec. 29.

The nature of an option right in the State of Oklahoma was defined in the ruling of *Anthis* v. *Sandlin, supra*:

> "An 'option' is a contract, by which the owner of property agrees that another shall have a right to buy it at a fixed price within a certain time. The owner does not sell the property, but sells the privilege to buy at the option of the other person * * * *an option conveys no title to the thing sold, but creates rights in personam* * * *."

citing the case of *Ide* v. *Leiser*, 10 Mont. 5, 25 Pac. 695, 24 Am. St. Rep. 17, which exhaustively discussed and classified contracts concerning real property as follows:

> "There may be (*1*) a sale of lands; (*2*) an agreement to sell lands; and (*3*) what is popularly called an 'option.' The first is the actual transfer of title from grantor to grantee by appropriate instrument of conveyance. The second is a contract to be performed in the future, and, if fulfilled, results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur by which the contemplated sale may never take place. The third, an option, originally is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a certain

time. He does not sell his land; he does not then agree to sell it; but he does then sell something, *viz.*, the right or privilege to buy at the election or option of the other party. The second party gets, *in praesenti*, not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. *The owner parts with his right to sell his lands, except to the second party, for a limited period.* The second party receives this right, or rather, from his point of view, he receives the right to elect to buy." (Italics ours.)

The above language, adopted by the Oklahoma court, and now the prevailing law in this jurisdiction, enunciates the law relating to options to be "the second party gets, *in praesenti* * * * the right to call for and receive lands if he elects." The right of the optionee is, therefore, presently vested and is not suspended and subject to any limitation or condition. It is, therefore, erroneous to apply the perpetuity rule in this jurisdiction. As stated heretofore, the Court of Appeals' decision is the only one by which a court has held that an option, creating only rights *in personam*, is invalid, as violating the rule against perpetuities. The decision, as it now stands, becomes a hybrid solution of indissoluble theories of law.

POINT B.

In Oklahoma, an option contract is a personal privilege, limited to the optionee and where there is no provision for its assignment and where it does not expressly extend such rights to the optionee's heirs and assigns, the rights created therein are uninheritable, nonassignable and expire upon the optionee's death.

Much consideration has been given to the question of long time options by Professor William E. Berg, Jr., Professor of Law at the University of Colorado. Professor

Berg wrote one of the most extensive and exhaustive series of three articles on this subject in the 1949 California Law Review. A complete analysis of all the decisions from early English Law until modern adjudications has been incorporated in his excellent article. At pages 261-262, Professor Berg writes as follows:

> "In addition there is a line of authority which we may designate as the 'West Virginia doctrine,' which stands for the proposition that an option which does not contain language indicating that the assigns or successors of the optionee are to obtain the benefits thereof is non-assignable even though the option requires payment of the purchase price in cash. The courts following this doctrine have viewed the option as being no more assignable than an ordinary offer unsupported by consideration. *It follows that the perpetuities question should not arise with respect to such options in jurisdictions which follow this exceptional doctrine.*" (Italics ours.)

Professor Berg cites the following authorities:

> "*Wheeling Creek Gas Co.* v. *Elder,* (C. C. N. C., W. Va., 1909) 170 Fed. 215; *Rease* v. *Kittle,* (1904) 56 W. Va. 269, 49 S. E. 150; *Newton* v. *Newton,* (1876) 11 R. I. 390; *Vanderlip* v. *Peterson,* (1906) 16 Manitoba L. R. 341; see *Landon* v. *Morehead,* (1912) 34 Okl. 701, 707, 126 Pac. 1027, 1029."

Oklahoma is specifically included in the above list of authorities adhering to the "West Virginia doctrine." The syllabus in *Landon* v. *Morehead, supra,* provided as follows:

> "2. An option for the purchase of lands made to one named therein, his heirs, or assigns, is, by the express terms of the option, assignable."

In the body of the opinion, the Oklahoma Court declared as follows:

"An option, giving the right to purchase property * * * is a *personal privilege, limited to the optionee, if made to him exclusively;* but where the right is given, not to the optionee only, but to him or his assigns the right of assignment thereof is provided for in the option itself."

The Oklahoma Court, in rendering its decision in *Landon* v. *Morehead, supra,* quoted liberally from the West Virginia case of *Fulton* v. *Messenger,* 61 W. Va. 477, 56 S. E. 830, obviously placing Oklahoma among the list of states adhering to the "West Virginia doctrine":

"An optional contract, giving the right to purchase property within a certain time, and upon certain conditions, is often a valuable right; but, under the authorities above cited, it is a *personal privilege, limited to the optionee, where there is no provision for its assignment.* But where the parties have expressly stipulated for an assignment, it is difficult, indeed, to find a reason why this may not be done. It cannot be longer said to be personal to the optionee, because, by the express terms of the contract, the optioner has agreed to sell and convey to the optionee or his assigns. *Kerr* v. *Day,* 14 Pa. 112 (53 Am. Dec. 526); *Napier* v. *Darlington,* 70 Pa. 64; *Bank* v. *Baumeister,* 87 Ky. 6 (7 S. W. 170); *Laffan* v. *Naglee,* 9 Cal. 662, 70 Am. Dec. 678; *House* v. *Jackson,* 24 Or. 89 (32 Pac. 1027); *Sutherland* v. *Parkins,* 75 Ill. 338. Other cases in point are: *Myers* v. *Stone, et al.,* 128 Iowa 10, 102 N. W. 507, 111 Am. St. Rep. 180, 5 Ann. Cas. 912; *Simmons* v. *Zimmerman,* 144 Cal. 256, 79 Pac. 451, 1 Ann. Cas. 850; *Rease* v. *Kittle, et al.,* 56 W. Va. 269, 49 S. E. 150; *House* v. *Jackson,* 24 Or. 89, 32 Pac. 1027; *Perry* v. *Paschal,* 103 Ga. 134, 29 S. E. 703; *Gustin* v. *Union School District* 94 Mich. 502, 5 N. W. 156, 34 Am. St. Rep. 361."

The Oklahoma court thereby adopted some 13 decisions

fortifying the rule in Oklahoma that an option grant *must expressly extend the optionee's rights* to his *heirs* or *assigns,* otherwise such rights are personal and, as a matter of law, not the subject of inheritance or assignment. It is respectfully urged that no plainer language enunciating a rule of law has ever been proclaimed by an appellate tribunal.

There are two cases which have upheld a long term option on the basis that the option letter was made to a certain member of a family, as in the case of *Dodd* v. *Rutterman,* 330 Ill. 362, 161 N. W. 756, which was an agreement by a mother giving an option letter to her daughter. There was also the case of *Weitzmann* v. *Weitzmann,* 87 Ind. App. 236, 161 N. E. 385, which was an option grant from a father to his son. These decisions upheld the option as being personal to the optionee on the theory that the option grant was given to a certain member of a family for his personal use only and for such unique purpose the option was upheld. Petitioner contends that the rationale contained in those cases is not applicable here. It is not a case of the court attempting to determine the intention of the parties, but rather an examination of the wording of the option letter itself. This is not a case for "evidentiary presumption."

The State of Kentucky has a statute forbidding the suspension of the absolute power of alienation, containing identical language of the Oklahoma statute. In June, 1950, the Kentucky Court of Appeals rendered the most recent decision construing a repurchase option inserted in a deed in the case of *Campbell* v. *Campbell,* 313 Ky. 249, 230 S. W. (2d) 918. That case, from a factual standpoint and from the interpretation of a local statute, was identical with the case now on appeal.

In the *Campbell* case there were two grantors, one Cleveland Campbell and his wife, Dicy Campbell, who executed a deed of conveyance to one Charlotte Campbell, the deed being in the usual form, except for this provision:

> "It is further agreed by the parties that in the event the said Charlotte Campbell wants to sell this land *at any time,* the said Cleveland Campbell is to have the first preference on her offer."

The only difference in the Campbell option and the Morgan option was that the Morgan option was fortified by the amount which optionee would be required to pay, namely, $20,000.

Four years later Charlotte Campbell and her husband executed a deed to the property to a third party other than the grantors. Shortly thereafter Charlotte Campbell died. Cleveland Campbell instituted an action against the husband of Charlotte Campbell and the third party purchasers, in which he relied upon the reservation in the deed from Cleveland Campbell and wife to Charlotte Campbell to recover the land, asking the court to require the defendants to execute to him a deed for the sum of $800.00, which was the price for which the land had been sold to the third parties by Charlotte Campbell and her husband. The Kentucky court cited the former Kentucky case of *Maddox* v. *Keller,* 296 Ky. 440, 177 S. W. (2d) 568, and *H. J. Lewis Oyster Co.* v. *West,* 93 Conn. 518, 107 Atl. 133, specifically holding that the ruling in those cases does not control if the contract was a personal one. The late Kentucky decision was based strictly upon the *wording of the instrument reserving the option.* The Kentucky court recognized a majority of the cases, holding that such an option violated the rule of perpetuities. However, it was pointed out that in all those cases there was an attempt by the heirs of the

beneficiary to enforce the right of repurchase, and that the option instrument in the majority of cases expressly extended the option to the optionee's heirs and assigns. The *Campbell* case, in citing the *H. J. Lewis Oyster Company* case, pointed out that, by inference, without the words "heirs and assigns," the reservation of the option would have been construed as personal to the optionee:

> "In the case before us there were two grantors in the deed, but the option to repurchase was given to only one of them and *there was no mention of heirs or assigns.* We think the option was personal to Cleveland Campbell, and therefore not violative of the rule against perpetuities *or our statute against restraints on the right of alienation.* KRS 381.220." (Which is the same as Title 40, Okla. Statutes, Sec. 175.47.)

The new Kentucky decision now numbers that state among those jurisdictions adopting the "West Virginia doctrine."

The Court of Appeals refused to follow the Oklahoma statutory rule of construction, which provides as follows:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (Title 15, Okla. Stats. Ann., Sec. 170.)

In the Oklahoma case of *Texas Company* v. *Adelman, et al.,* 186 Okl. 663, 99 P. (2d) 874, 127 A. L. R. 945, the court held as follows:

> "Of all the rules relating to the construction of contracts the one of most importance is that the intention of the parties at the time of the contract must control. * * * This lease was prepared by and on a form of The Texas Company, and any doubt as to the meaning of such paragraph should be interpreted most

strongly against the party who caused the uncertainty to exist."

The Kentucky court in the *Campbell* case, cited above, declared as follows:

> "The rule against perpetuities is not a rule of construction, but a rule of property, yet if there are two possible constructions of an instrument, one which would render it invalid, preference will be accorded to the construction which will uphold it. *Goodloe's Trustee and Administrator* v. *Goodloe*, 292 Ky. 494, 166 S. W. (2d) 836."

The Court of Appeals held that the ruling the Oklahoma case of *Bowen* v. *Vance, supra*, made it "reasonably plain that under the law of Oklahoma, unless an option contract expressly provides that it shall be personal to the optionee, the rights under it pass to his heirs or personal representatives." (R. 69) The actual facts in the *Bowen* v. *Vance* case were that the contract itself specifically provided as follows:

> "It is also agreed and mutually understood that the terms, provisions and conditions of this contract shall be and remain binding on the parties hereto, their *heirs, successors, and assigns.*"

The *Bowen* v. *Vance* case actually enunciates only one rule of law in Oklahoma and that is that an option contract does not convey any title in the real estate. This case did not decide the inheritability or assignability of an option contract, such as the one granted this petitioner Morgan. Much to the dismay of petitioner's counsel, the Court of Appeals ignored mention of the late Kentucky case of *Campbell* v. *Campbell, supra*, and of the Oklahoma case of *Landon* v. *Morehead, supra*, although both cases were prominently discussed in petitioner's briefs.

POINT C.

The respondent and grantee, having accepted the benefits of the Warranty Deed, having entered into possession of the land, and the position of the parties now being changed, is estopped from denying the validity of any portion of the deed.

The Complaint and Answer (R. 1-4) sufficiently show on the face thereof the facts giving rise to an estoppel on the part of the respondent. *Skelly Oil Company* v. *Butner,* 201 Okl. 32, 205 P. (2d) 1153.

Title 16, Oklahoma Statutes, Section 11, was quoted in the petition. There have been many Oklahoma decisions construing this statute. This statute obviously stems from an equitable recognition of the moral threads which go to make up our legal fabric and preclude one from taking diverse positions as to the legality of a written instrument, seeking in one breath to uphold the instrument and simultaneously exhaling the invalidity thereof.

In *Nickel, et al.,* v. *Janda, et al., supra,* the Oklahoma court quoted Caspersz in his work on Estoppel and Res Judicata (3d ed.), pages 282-283:

> "Under these circumstances, it appears to us that justice, equity and good conscience require no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been induced to alter his position on the faith of the instrument."

In *Carlisle, et al.,* v. *National Oil & Development Co., et al., supra,* provided in syllabus 1:

> "A person who, with full knowledge of the facts, at a time when he is fully competent and capable to

contract for himself, accepts the benefits accruing under the void contract, adopts the contract, and is estopped to deny the validity thereof."

In *Williamson* v. *Davis, supra,* the Oklahoma court held:

"Unquestionably, the plaintiff in error, having accepted a deed to this property, which was by him placed of record, thereby takes the same subject to all the provisions thereof, and by the express terms of this deed he recognizes the validity of the lease held by Tank Davis upon this property for the year 1915, and is not in a position to controvert or to deny the validity of this lease."

The court further quoted from *Nation* v. *Bank,* 29 Okl. 821, 119 Pac. 277, 278:

" 'Text-writers and courts, without dissent seem to accept as the correct rule the doctrine that one who takes a conveyance, absolute or conditional, reciting that it is second or subordinate to some other mortgage or lien, is not the purchaser of the entire thing conveyed, thereby, but that he purchases only the surplus or residuum after satisfying the other incumbrances, and that he is estopped to deny the existence of a prior mortgage or the validity of the lien, although it be not acknowledged, recorded, or filed as required by the statutes. * * *' "

To the same effect is the holding of *U. S. Bond & Mortgage Company* v. *Keahey.*

In *Kaylor* v. *Kaylor, supra,* it is held:

"It is a well-settled doctrine in the State of Oklahoma, that one knowingly having received and accepted the benefits of any part of a conveyance, mortgage, or contract relating to real estate shall be concluded thereby, and estopped to deny the validity of such con-

veyance, mortgage, or contract, or the authority to make and execute the same, unless it would be on the account of fraud.

"Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud."

In *Allred* v. *Royalty Owners Association, supra,* the court stated:

"Any person who knowingly accepts the benefits of a conveyance or a contract relating to real estate is estopped to deny the validity of such conveyance or contract."

In *Gibson* v. *Lyon, supra,* the Supreme Court of the United States said:

"He certainly cannot be permitted to claim both under and against the deed: to insist upon its efficacy to confer a benefit and repudiate a burden with which it has qualified it: to affirm a part and reject a part. * * * It is a plain case of estoppel."

The United States Supreme Court in *Keller* v. *Ashford, supra,* provided:

"Having thus accepted the benefit of the conveyance, he cannot repudiate the burden imposed upon him by the express agreement therein, and would clearly have been liable to his grantor for any breach of that agreement. * * * Though the assumption of the mortgage debt by the subsequent purchaser is absolute and nonqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. * * *".

Finally, in *Cowell* v. *Colorado Spring Company, supra,* the court provided:

> "But there is another and general answer. * * * The defendant, as already stated, went into possession of the premises in controversy under deed of the plaintiff. * * * he is therefore estopped when sued by the grantor, etc."

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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